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PACIFIC JUSTICE INSTITUTE



November 12, 2008

Chief Justice Ronald M. George
and the Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

**Letter Brief of *Amicus Curiae* Recommending Denial of Request for Stay in**
*Strauss, et al v. Horton, et al.* Case No. S168047

Honorable Justices:

Pacific Justice Institute, on behalf of itself, submits this *amicus* brief to address the legal standards for granting a stay of the implementation of a constitutional provision.

## Summary of the Argument

The stay should be denied based on the following two points:

1. The California Supreme Court lacks the authority to stay the implementation of a duly enacted amendment to the Constitution.
2. A stay will alter the status quo. The definition of marriage was placed in the constitution by amendment of the people by operation of law on November 6, 2009. CA Const. Art.VIIII, §4. Further, same sex marriage was the status quo for a mere 143 days before the election. Save for that 143 day period,

marriage between a man and a woman has been the status quo in California since 1850.

## Interest of *Amicus Curiae*

Pacific Justice Institute is a nonprofit organization which has provided extensive legal counsel and representation to religious organizations and people of faith relative to amending the California Constitution so that marriage is defined with clear parameters. In addition, Pacific Justice Institute attorneys represent scores of churches in securing their expressive rights of religion, speech, and association under the U.S. and California Constitutions, as well as, protecting them from interference from the government, in violation of the Establishment Clause, in theological and ecclesiastical matters.

## Argument

### a. The California Supreme Court lacks the authority to stay implementation of a duly enacted amendment to the Constitution.

Petitioners rely on section 923 of the California Code of Civil Procedure (CCP) as authority for a stay of the implementation of Article II, §8 of the California Constitution. This section provides no grounds upon which the Supreme Court can prevent the implementation of a constitutional amendment while it is under review by the Court. Indeed, Petitioners have cited to no case in California's 158 years of judicial history in which this Court has taken such an action. There is a good reason for this. Such action would be an usurpation by the judiciary in violation of the separation of powers. CA Const. Art. III, §3.

Having failed to cite even one case under CCP §923, Petitioners then rely on *Rosenfeld v. Miller* (1932) 216 Cal. 560, involving a writ of *supersedeas*. This is simply the wrong application of the law to the facts. The use of such a procedure is only available when there is a lower court order to supersede. "[A] writ of *supersedeas* will not issue 'where no process of or action by the court below is involved.'" *Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal. App. 2d 368, 377 (string cite

omitted). In the present petition before this Court, there are no lower court orders for which this procedure can be employed. It should not be overlooked that the Petitioners have failed to identify a single case in which a writ of *supersedeas* has been used in relation to a request to stay implementation of a statute, much less an amendment to the Constitution.

Failing to present even a colorable claim that this Court has authority under CCP §923 to stay implementation of a constitutional amendment, the Petitioners turn to cases involving preliminary injunctions. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199; *2M Restaurants, Inc. v. San Francisco Joint Exec. Bd. of Culinary Workers* (1981) 124 Cal.App.3d 666, *Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432; *White v. Davis* (2003) 30 Cal.4th 526; *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63.) Again, not one of the cases cited by the Petitioners involves a stay of the implementation of a constitutional amendment.

In sum, the Petitioners have not provided any support for the threshold question of whether this Court has the authority to stay implementation of a duly enacted provision of the Constitution.

**b. The status quo consists of the definition of marriage found in the Constitution.**

Even if this Court had the authority to grant a stay of the implementation of Art. II, §8 of the Constitution, a stay would alter the status quo. The definition of marriage was inserted into the constitution by amendment of the people by operation of law on November 6, 2009. "A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise." CA Const. Art.VIIII, §4. Because the Petitioners failed to seek and receive an emergency stay before the law went into effect on November 6, 2008, the status quo is unquestionably the definition of marriage as determined by the voice of the people. Petitioners' position that the status quo will not be unchanged if a stay is ordered is simply wrong as to the facts.

The Petitioners apparently argue that this Court's decision overturning Family Code § 308.5 (commonly referred to as Proposition 22)

is the current status quo. *In re Marriage Cases* (2008) 43 Cal.4th 757. Simply put, that was the status quo before November 6, 2008. But from November 6 until the present, the status quo is that "[o]nly marriage between a man and a woman is valid and recognized in California."

Moreover, taking a historical view of marriage in this state provides a clearer perspective on whether the Petitioners' request for a stay is an alteration to what is understood as "marriage." This Court's determination that defining marriage as between a man and a woman is unconstitutional was the status quo from June 16, 2008 until November 5, 2008 -- a mere 143 days. But, marriage between a man and a woman has been the existing state of affairs since 1850 and, except for the 143 day interval, has been the status quo once again starting November 6th. The Petitioners' request for a stay would thus be a radical departure from both the state of the law as it stands today as well as from a historical perspective, i.e., 158 years versus 143 days.

**Conclusion**

This Court lacks the authority to provide the remedy sought by the Petitioners – a stay of implementation of a constitutional amendment. Thus, because the Petitioners' remedy is devoid of any legal merit, the request for a stay should be denied.

Respectfully submitted,

PACIFIC JUSTICE INSTITUTE

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PROOF OF SERVICE

I declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of Sacramento. My business address is 9851 Horn Road, Ste. 115, Sacramento, CA 95827. On November 12, 2008, I caused to be served the following document.

AMICUS CURIAE LETTER IN OPPOSITION TO THE PETITION FOR WRIT OF MANDATE FILED BY KAREN L. STRAUS (STRAUSS, ET AL. v. HORTON, ET AL.)

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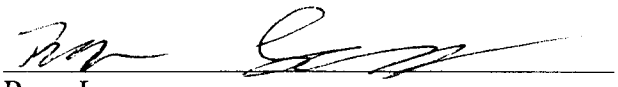

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